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NO. 83-630

IN THE
SUPREME COURT OF THE UNITED STATES

EFREM BERNAL,

Petitioner,

V.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals Properly Apply the Rational Basis Test in Upholding a Texas Statute Prohibiting An Alien from Holding the Office of Notary Public?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES THE State of Texas, and files this Opposition to Petition for Writ of Certiorari filed by Petitioner.

SUMMARY OF ARGUMENT

Petitioner has challenged the constitutionality of Texas Revised Civil Statutes Annotated, Article 5949(2), which prohibits non-citizens from holding the Office of Notary Public. Finding Notaries Public hold an important non-elective office, the Fifth Circuit Court of Appeals properly applied the rational basis test in upholding the statute. Because the Court of Appeals did not err in following prior decisions of this Court on the same subject, because the statute protects an important political function of the State, this Court should not grant the petition for certiorari.

ARGUMENT

THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR OPINIONS OF THIS COURT ON THE SAME SUBJECT.

The petition for writ of certiorari should be denied because this Court has already clearly stated its view that strict scrutiny is not required to uphold a state alienage restriction protecting an important political function. The petition should also be denied because the Fifth Circuit's decision is consistent with this Court's prior opinions on the same subject.

Placing principal reliance upon *In re Griffiths*, 413 U.S. 717 (1973), Petitioner asserts that the Fifth Circuit's decision conflicts with relevant opinions of this Court. Objecting to the Fifth Circuit's "relegation" of *In re Griffiths* to a footnote, Petitioner fails to address this Court's most recent decision on the subject, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), the authority upon which the Fifth Circuit principally relied in making its decision.

In *Cabell*, this Court recognized that, under the Court's holdings in *Sugarman v. Dougall*, 413 U.S. 634 (1973), and other cases, citizenship is "a relevant ground for determining membership in the political community," 454 U.S. at 438, and that strict scrutiny will not be applied when the restriction serves primarily a political function. *Sugarman v. Dougall, supra*, 413 U.S. at 648.

In re Griffiths, supra, invalidated a statute precluding aliens from working as lawyers. The state had tried to transubstantiate lawyers into officials of government because the statute fortuitously made every lawyer a "commissioner of the Superior Court" and authorized him or her "to sign writs and subpoenas, take recognizances, [and] administer oaths." 413 U.S. at 724. Properly viewed, Griffiths is merely one of this Court's long line of cases

advancing an alien's "right to work for a living in the common occupations of the community." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

This Court has clearly drawn the line of demarcation for level of scrutiny required to uphold a state restriction based upon alienage. Strict scrutiny is required when such restrictions strike "at the noncitizens' ability to exist in the community." *Foley v. Connelie* 435 U.S. 291, 295 (1978). Thus, absent a compelling reason, aliens may not be excluded from working in the laundry business, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); from obtaining commercial fishing licenses, *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); from access to educational benefits, *Nyquist v. Mauclet*, 432 U.S. 1 (1977); from a broad range of public employment, *Sugarman v. Dougall*, 413 U.S. 634 (1973); from the practice of licensed professions, *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); or from the practice of law, *In re Griffiths, supra.*

Petitioner does not, indeed cannot, assert any such economic interest. In his deposition below, Petitioner testified that he continued to be gainfully employed and that he would have occasion to exercise the powers of a Notary Public only two to four times a month. Petitioner further observes that a minority of other states have statutes requiring United States citizenship for being licensed as a notary. However, the record does not reflect the existence of even one other non-citizen notary in Texas or in the country who would suffer the dire economic consequences suggested by Petitioner if this Court denies certiorari.

Moreover, since the subject restriction serves primarily a political function, the *Sugarman v. Dougall*, 413 U.S. 634 (1973), test is triggered; and the restriction: 1) must not be "substantially over or under inclusive"; and 2) even if sufficiently tailored, it must be limited to "state elective or important nonelective" positions. *Cabell v.*

Chavez—Salido, supra, 454 U.S. at 440. Petitioner's sole contention is that the office of Notary Public in Texas is not important enough to warrant application of the rational basis standard of review.

Properly applying Sugarman and Cabell, and after examining the functions of Notaries Public in the State of Texas, the Court of Appeals disagreed.

Examination of the function of Notaries Public in Texas government illustrates that such officials directly participate in the *operation or execution* of policy, "which substantially affects members of the political community." *Cabell v. Chavez—Salido, supra*, 454 U.S. at 441. Notaries Public bear the State's Seal, indicative of the sovereign power of government. No one, not even a citizen, has an absolute right to be a Notary Public. So important was the Notary's function in Texas history that, until 1939, confirmation by the State Senate was required to hold the office. See Article 5949, historical note, Vernon's Texas Civil Statutes. In certain areas, Notaries possess power co-extensive with that of County Clerks (art. 5954). *Inter alia*, Notaries certify to acknowledgments (art. 6602) of conveyances which admit the instruments to public record (art. 66236); by the mere stroke of a pen, they wield power to cause wills to be admitted to probate without supporting proof (Probate Code, §§ 59, 84); and they take out-of-court depositions and administer oaths, including oaths of admission to the practice of law.

As suggested by the Fifth Circuit, "[t]he notary public may symbolize the power of the political community" bearing "a rational relationship to the state's interest in the proper and orderly handling of documents and other business of importance to the State." See Petitioner's Appendix, p. 24a. The State respectfully reserves the right to delegate this portion of its sovereign power to those who have elected participation in the process of

democratic government by swearing allegiance of citizenship. As this Court succinctly stated in *Foley v. Connelie, supra*, 435 U.S. at 297, "the right to govern is reserved to citizens."

Finally, Petitioner suggests that the Court of Appeals erred in applying *Sugarman* because Notaries Public are not government employees (but usually private individuals) and hence do not hold important public office. However, this Court has explicitly abandoned the interpretation urged by Petitioner: "This distinction between the economic and political functions of government has, therefore, replaced the old public/private distinction." *Cabell v. Chavez—Salido, supra*, 454 U.S. at 440. In Texas, Notaries Public are public officials, a fact properly recognized by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Petition for Writ of Certiorari has been sent via U.S. Mail, certified, return receipt requested on this the 16th day of November, 1983 to Mr. Thomas Sullivan and Denis A. Downey, DOWNEY & SULLIVAN, 1185 F.M. 802, Suite 3, Brownsville, Texas 78520, to Mr. Cornish F. Hitchcock (Counsel of Record), Mr. Alan B. Morrison and Mr. John Cary Sims, PUBLIC CITIZENS LITIGATION GROUP, Suite 700, 2000 P Street, NW, Washington, D.C. 20036, Attorneys for Petitioner.

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